

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

FC 2011-004641

06/18/2012

JUDGE M. SCOTT MCCOY

CLERK OF THE COURT

A. Ocanas

Deputy

IN RE THE MARRIAGE OF
ALICE H LUNA

TERRY BAYS SMITH

AND

MICHAEL R MILLER

WILLIAM JAMES FISHER

DOCKET-FAMILY COURT CCC
FAMILY COURT SERVICES-CCC
MARLENE JOY
10505 N 69TH ST., STE 1200
SCOTTSDALE AZ 85253

DECREE OF DISSOLUTION

Following completion of Trial on June 12, 2012 regarding Petitioner/Mother's Petition for Dissolution filed on July 20, 2011, the Court took this matter under advisement. Having considered the evidence and argument presented, the Court now rules.

I. Dissolution of Marriage

THE COURT FINDS that at least one of the parties has been domiciled in the State of Arizona for more than 90 days immediately preceding the filing of the Petition; that the conciliation provisions of A.R.S. § 25-381.09, and the domestic relations education provisions of A.R.S. §25-352 either do not apply or have been met; that the marriage is irretrievably broken and there is no reasonable prospect for reconciliation.

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To the extent it has jurisdiction to do so, the Court has considered and made provisions for maintenance and disposition of property, and, where applicable, support, custody and visitation.

IT IS ORDERED that the marriage existing between the parties is dissolved, and each party is returned to the status of a single person effective upon the signing and entry of this Decree.

II. Legal Custody and Parenting Time

A. Legal Custody/Parenting Time

The Parties have the following minor children in common:

Name: Michael Aaron Miller	DOB: May 2, 2009
Name: Eli Joseph Miller	DOB: November 30, 2010

THE COURT FINDS that the children lived in Arizona with a parent, or a person acting as a parent, for at least six consecutive months or more prior to the commencement of this action, or at least from the time of the children's birth until this action was commenced, and that Arizona is the home state of the children vested with jurisdiction to make a child custody determination pursuant to A.R.S. § 25-1031(A) (1).

The parties have already agreed on, and the Court awarded them, joint legal custody, but they continue to disagree whether Mother should have final decision-making authority and on parenting time.

Pursuant to A.R.S. § 25-403, the Court has considered all relevant factors and makes the following findings:

- **Wishes of the Parents (A.R.S. § 25-403(1)).** The Court finds that Mother requests that she have final decision-making authority and that Father continue to have parenting time every other weekend, with one additional overnight, and one night per week. Father does not wish for Mother to have final authority, and he now proposes equal parenting time under a week on/week off schedule.
- **Wishes of the Child (A.R.S. § 25-403(2)).** The Court finds that the children are too young to express a meaningful opinion on this issue.
- **Interaction Between Child and Parents, Siblings and Others (A.R.S. § 25-403(3)).** The Court finds that the children appear to have a healthy relationship

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with both parents and their respective families. They have spent significantly more time with Mother than Father, who historically has worked long hours.

- **The Child's Adjustment to Home, School and Community (A.R.S. § 25-403(4)).** The Court finds that the children are very young, but neither parent reports adjustment issues.
- **Mental and Physical Health of All Involved (A.R.S. § 25-403(5)).** The Court finds that Mother and Father appear to be in good mental and physical health. Michael has a heart defect that is being monitored by doctors, but so far this condition has not raised parenting issues.

Eli was born prematurely. He has a “complex medical history and fragile condition” that “requires carefully managed and skilled daily care.” Exhibit 20. Among other things, Eli does not chew his food properly, which requires “thickened feedings with vigilant assessment and manipulation during feedings to reduce his risk of aspiration.” *Id.* Mother testified that he has weekly feeding therapy, and all liquids must be thickened, to prevent aspiration. It takes approximately 1 hour to feed him.

Mother, Father and maternal grandmother are the only persons who can feed Eli at present. Paternal grandmother likely is capable of doing so, but she has not obtained the necessary training at this point. She also does not appear to understand fully the risks of Eli's condition.

- **Which Parent is More Likely to Allow Frequent and Meaningful Contact With the Other Parent (A.R.S. § 25-403(6)).** The Court finds that both parents are equally likely to allow frequent and meaningful contact with the other parent. Father contends that Mother does not “allow him to be a dad,” but he has not presented persuasive evidence in support of this theory. During the earlier stages of this case, Father was living with his brother temporarily, which Father admits was not an ideal situation for exercising his parenting time. He now lives with his parents, which would allow more parenting time, but he does not appear to be nearly as skilled as Mother at meeting Eli's needs. The Court notes this as an observation, not a criticism of Father. Any lack of skill on Father's part likely reflects the long hours and travel required for Father's employment, not any lack of desire.

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- **Whether One Parent, Both, or Neither has Provided for the Primary Care of the Child. (A.R.S. § 25-403(7)).** The Court finds that both parties have provided for the primary care of the children, though Mother has done so more than Father.
- **The Nature and Extent of Coercion or Duress Used by a Parent in Obtaining an Agreement Regarding Custody (A.R.S. § 25-403(8)).** The Court finds that no credible evidence indicates either party used coercion or duress.
- **Whether a Parent Has Completed the Parent Education Course (A.R.S. § 25-403(9)).** The Court finds that both parents have completed the course.
- **Whether Either Parent Was Convicted of an Act of False Reporting of Child Abuse or Neglect (A.R.S. § 25-403(10)).** The Court finds no evidence of false reporting.
- **Drug or DUI Convictions (A.R.S. § 25-403.04(A) and (B)).** The Court finds that neither parent has been convicted of a drug or alcohol offense within one year of the filing of the pending petition. No substance abuse issues have been reported, either.
- **Domestic Violence (A.R.S. § 25-403.03).** The Court finds no evidence of domestic violence

Pursuant to A.R.S. §25-403.01(B), the Court also has considered:

- **The Lack of Agreement Concerning Joint Custody (A.R.S. §25-403.01(B) (1)).** The Court finds that Mother does not agree that joint custody is in the children's best interests, unless she has final decision-making authority.
- **Whether the Lack of Agreement is Unreasonable or Influenced by an Issue Unrelated to the Best Interests of the Child or Children (A.R.S. §25-403.01(B) (2)).** The Court finds Mother's objection to joint custody is reasonable and is related to her good faith belief regarding the best interests of the children.
- **The Past, Present and Future Abilities of the Parents to Cooperate in Decision-Making About the Children to the Extent Required by an Order of Joint Custody (A.R.S. §25-403.01(B) (3)).** The Court finds that the parties communicate and cooperate well enough to facilitate joint custody, but there are clearly hard feelings related to the dissolution and parenting issues. With the

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appointment of a Therapeutic Interventionist, the Court believes that joint custody will be workable and in the children's best interests.

- **Whether Joint Custody is Logistically Possible (A.R.S. §25-403.01(B) (4)).**
The Court finds that joint custody is logistically possible.

Mother seeks final decision-making authority because the parties do not communicate well and because, she contends, Father minimizes the severity of Eli's condition. Communication issues can be overcome, and Father seems to accept Eli's condition. But he does not have the same understanding of Eli's medical needs as Mother. She is also more skilled at meeting Eli's needs.

THE COURT FINDS that it is in the children's best interests for Mother to have final decision-making authority regarding medical issues.

THE COURT FURTHER FINDS that a week on/week off schedule Father has requested is not feasible at this point. Father's job still requires that he work long hours, and he took 2 international business trips during the pendency of this litigation. With further education and training for Father and paternal grandmother regarding Eli's medical needs, equal parenting time may be feasible in the future. It is not feasible now, however.¹

IT IS THEREFORE ORDERED awarding the parties joint legal custody of Michael Aaron Miller (DOB: May 2, 2009) and Eli Joseph Miller (DOB: November 30, 2010). Mother shall have final decision-making authority regarding medical issues. She shall exercise that authority only after good faith efforts to consult with, and reach agreement with, Father.

IT IS FURTHER ORDERED that Father shall have parenting time every other weekend, from Friday at 5 p.m. to Monday morning at 8 a.m. and Tuesday afternoons, from 5 p.m. to 9 p.m.

The parties also have therapeutic needs. Mother appears to have significant emotional issues that she has not processed, and Father appears to feel resentful of his lack of role in the children's lives. An August 2011 incident between Mother and paternal grandmother also appears to be a large impediment to a healthy co-parenting relationship.

¹ In the long run, both the parties and the children will be better off if both sides of the family fully are able to meet Eli's needs. This would also give Mother freedom to seek more lucrative employment, which in turn would allow her to become more financially independent.

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IT IS THEREFORE ORDERED appointing Marlene Joy as Therapeutic Interventionist with goals of assessing the parties' therapeutic needs, recommending therapists to meet those needs and coordinating therapy among providers. Another goal is to ensure that Father and maternal grandmother obtain any education and training necessary to meet all of Eli's medical needs. A separate minute entry shall issue for the appointment of the Therapeutic Interventionist.

B. Holiday Parenting Time

The holiday schedule shall supersede all other non-holiday visitation/access and shall be alternated between the parties as follows:

On three-day weekends involving a Monday holiday (such as Civil Rights Day, Presidents' Day, Memorial Day, Labor Day, etc.) the children will remain in the care of the parent who has the children for the weekend if the parent has the holiday off. The return time will be Monday 6:00 p.m. or as agreed by the parties. If the Holiday falls on a Friday the parties will mutually agree on an early pick-up on Friday morning or as agreed by the parties.

Spring School Break: The children will spend the spring school break with Mother in even-numbered years and with Father in odd-numbered years. (The period is defined as 6:00 p.m. on the day that school releases until 24 hours prior to school commencing.)

Fall Break(s): the children will spend the fall school break with Father in even-numbered years and with Mother in odd-numbered years. (The period is defined as 6:00 p.m. on the day that school releases until 24 hours prior to school commencing.)

Easter: The children will celebrate Easter with Mother in even-numbered years and with Father in odd-numbered years. (9:00 a.m. to 6:00 p.m.)

Mother's Day will be celebrated with Mother every year. (9:00 a.m. to 6:00 p.m.)

Father's Day will be celebrated with Father every year. (9:00 a.m. to 6:00 p.m.)

4th of July: will be celebrated with Father in even-numbered years and with Mother in odd-numbered years. (11:00 a.m. to 11:00 p.m.)

Halloween: The children will celebrate Halloween with Mother in odd-numbered years and with Father in even-numbered years. This holiday shall be celebrated from 4:00 p.m. until return to school/daycare or other agreed site the following day.

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Thanksgiving: The children shall celebrate Thanksgiving with Mother in even-numbered years and with Father in odd-numbered years. This holiday shall be celebrated with the corresponding parent from 10:00 a.m. until 7:00 p.m.

Christmas Holidays: The children shall celebrate the Christmas Holidays with Mother in even-numbered years and with Father in odd-numbered years. The holiday shall be celebrated from December 24th at 10:00 a.m. until December 25th at 10:00 a.m. In odd-numbered years Mother shall have the children from 10:00 a.m. until 8:00 p.m. on December 25th.

New Year's Eve and New Year's Day Holidays: The children shall celebrate New Year's Eve (including overnight) with Mother in odd-numbered years and with Father in even-numbered years. The holiday shall be celebrated from December 31st at 10:00 a.m. until January 1st at 10:00 a.m. The parent who does not have the children on New Year's Eve shall have the child from 10:00 a.m. until 8:00 p.m. on January 1st.

Winter School Break: Parties will divide the winter school break equally. Mother shall have the first half of the school break and Father shall have the second half of the break. (The period is defined as 6:00 p.m. on the day that school releases until 24 hours prior to school commencing.) The Christmas Holidays and the New Year's Eve and New Year's Day schedule will supersede the winter break schedule.

Children's Birthdays: As per the weekday and weekend schedule.

IT IS ORDERED that each party may have 5 days of vacation time with the minor children each year. Each party shall provide 30 days' advance written notice to the other parent of their intention to exercise his/her vacation time. Along with the notice of intent to exercise vacation time, the party exercising vacation time with the children shall provide a complete and detailed itinerary to the other parent, including locations and telephone numbers where the children can be reached at all times. Vacation time shall not impact upon the children's school schedule and summer access shall end no later than one week prior to the start of school.

The parents may change their schedule by mutual agreement.

III. Additional Custody/Parenting Time Orders

1. Neither parent shall expose the children to any incidents of domestic violence or extreme or hostile conflict or language. Neither parent shall expose the children to derogatory comments about the other parent or the relatives or friends of the other parent. The parents shall neither argue nor insult each other in the presence of the children or allow a third party to do so. Neither parent shall frighten the children by saying things such as that the other

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parent is trying to take him/her away, the other parent does not love him/her, want to see him/her, or is interfering with visits.

2. The parents shall not discuss custody, parenting time or child support issues in the presence of or with the children. The parents shall ensure that the children are not exposed to any discussion of custody disputes or legal proceedings other than to assure the children that the parents are trying to work out appropriate arrangements so that the children can have frequent and regular access to both parents.

3. The parents shall not question the children about where they want to live. The parents shall not question the children about the personal life of the other parent. The parents shall not express to the children how angry they are at the other parent, how they doubt the trustworthiness of the other parent or how hurt or frustrated they are by the actions of the other parent.

4. The parents are encouraged to communicate by e-mail and/or facsimile. Except for minor questions or emergencies, the parents are to afford each other reasonable time to consider and respond to requests or inquiries. However, e-mail and/or facsimile communications should be responded to within 24 hours. If the parents do not have e-mail or fax available to them, telephonic communication is allowed.

5. Each parent is restrained from using or permitting others to use the children to convey oral or written messages between households. Communications should take place directly between adult household members and the children should be protected from involvement in adult issues, for example, changes in the parenting time schedule.

6. Neither parent shall treat the children, or allow the children to be treated by any third party in the home, in a different manner than they treat the other children in the home, simply because the children have a relationship with the other parent or spends time with the other parent.

7. The children shall have phone access to both parents at all times. The children shall be given privacy during phone calls and there shall be no interference with phone access.

8. Both parents shall be listed as emergency contacts on any such forms that require contact information such as, but not limited to, education, activities, childcare and/or medical providers.

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9. During exchanges, the parties shall make every effort to be polite and respectful to each other. Interaction between the parents shall be restricted to the orderly exchange of the children. The parents are not to use the exchanges of the children or other circumstances in which the children are present to share information with one another, make requests of one another, engage in negotiations, or related activities.

10. Pursuant to A.R.S. § 25-403.06, unless otherwise provided by Court order or law, on reasonable request, both parents are entitled to have equal access to documents and other information concerning the children's education and physical, mental, moral and emotional health including medical, school, police, court and other records directly from the custodian of such records or from the other parent.

11. No petition to modify the existing Court orders regarding custody and parenting time shall be filed without the parties first attempting to resolve their dispute through mediation with their assigned parenting coordinator, private mediation, or Conciliation Services.

IV. Child Support

THE COURT FINDS that the relevant financial factors required to be included, and the discretionary allowances and adjustments which the Court will allow, for a current calculation of child support pursuant to the Arizona Child Support Guidelines are set forth in the Child Support Worksheets filed separately this date which the Court hereby incorporates and adopts as its findings with respect to child support.

THE COURT FURTHER FINDS Father's Past Child Support obligation for the period from August 1, 2011 to November 30, 2011 (when temporary orders became effective) to be \$2,472.00. Father's monthly obligation during this time period (when he was not yet paying spousal maintenance) was \$1,618 per month; the time period was four months; and Father paid \$1,000 per month directly to Mother for support. *See Exhibit 5.*

Regarding current child support and other child support issues,

IT IS ORDERED incorporating by reference the Child Support Order filed separately this date.

IT IS FURTHER ORDERED approving and settling formal written Child Support Order signed by the Court on June 18, 2012 and filed (entered) by the Clerk on June 18, 2012.

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V. Spousal Maintenance

Mother seeks an award of spousal maintenance. Father does not dispute that Mother meets the criteria for spousal maintenance, but he disagrees on the amount and duration of spousal maintenance.

A.R.S. § 25-319(B) controls those issues. The factors to be considered, and the Court's findings on those factors, follow:

- **The standard of living established during the marriage (A.R.S. § 25-319(B) (1)).** The Court finds that the parties lived a modest but comfortable standard of living during the marriage.
- **The duration of the marriage (A.R.S. § 25-319(B) (2)).** The Court finds Husband and Wife were married for 11 years when the Petition for Dissolution was served.
- **The age, employment history, earning ability and physical and emotional condition of the spouse seeking maintenance (A.R.S. § 25-319(B) (3)).** The Court finds that Mother is 35 years old. She has attended college at ASU West but has not received a degree. She works as a translator for a contractor to the federal government. She averages about 16 hours per week and is paid \$26.33 per hour, or \$1,819 per month. She cannot demand more hours at work. She appears to be experiencing emotional issues related to the dissolution.
- **The ability of the spouse from whom maintenance is sought to meet that spouse's needs while meeting those of the spouse seeking maintenance (A.R.S. § 25-319(B) (4)).** The Court finds that Wife currently cannot meet her reasonable needs.
- **The comparative financial resources of the spouses, including their comparative earning abilities in the labor market (A.R.S. § 25-319(B) (5)).** The Court finds that Husband has greater financial resources by virtue of his greater earning capacity (\$75,000 per year (or more) versus less than \$25,000 per year for Mother).
- **The contribution of the spouse seeking maintenance to the earning ability of the other spouse (A.R.S. § 25-319(B) (6)).** The Court finds that Mother contributed to Father's earning capacity by meeting the children's needs while he

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was working long hours and traveling. Father and Mother both attended school during the marriage (6 years for Father; 3 years for Mother).

- **The extent to which the spouse seeking maintenance has reduced that spouse's income or career opportunities for the benefit of the other spouse (A.R.S. § 25-319(B) (7)).** The Court finds insufficient evidence to conclude that Mother reduced her income or career opportunities for Father's benefit.
- **The ability of both parties after the dissolution to contribute to the future educational costs of their mutual children (A.R.S. § 25-319(B) (8)).** The Court finds no credible or persuasive evidence that the children will have significant educational costs.
- **The financial resources of the party seeking maintenance, including marital property apportioned to that spouse, and that spouse's ability to meet that spouse's own needs independently (A.R.S. § 25-319(B) (9)).** The Court finds that Wife will not be allocated any significant or income producing property in the dissolution. She currently cannot meet her own needs independently.

Mother earns \$1,819 per month while working an average of 16 hours per week. This arrangement is appropriate because it allows her to meet the children's extensive medical needs, which Father historically has been uninvolved with due to the demands of his job.

Her alternative would be to be a take a customer service job paying \$14 to \$15 per hour. This would mean more gross pay (approximately \$2,600 per month), but then she would not be available to meet Eli's needs and she likely would incur more expenses for Eli's care.²

- **The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment and whether**

² The Court understands that Father believes his mother can care for Eli, freeing Mother up to work full time. But paternal grandmother's testimony indicates that she does not understand the significance of Eli's medical condition. She has also not taken the training necessary to meet fully Eli's needs. And though they used to be very close, Mother and paternal grandmother have also not spoken since August of 2011, when an incident between them led to police involvement. For the sake of all concerned, the Court hopes that the parties will work with the Therapeutic Interventionist to heal these wounds.

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such education or training is readily available (A.R.S. § 25-319(B) (10)). The Court finds that Mother does not seek additional education or training.

- **Excessive or abnormal expenditures, destruction, concealment or fraudulent disposition of community, joint tenancy and other property held in common (A.R.S. § 25-319(B) (11)).** The Court finds no such expenditures or waste.
- **The cost for the spouse who is seeking maintenance to obtain health insurance and the reduction in the cost of health insurance for the spouse from whom maintenance is sought if the spouse from whom maintenance is sought is able to convert family health insurance to employee health insurance after the marriage is dissolved (A.R.S. § 25-319(B) (12)).** The Court finds Mother will pay approximately \$310 per month to obtain medical insurance.
- **All actual damages and judgments from conduct that results in criminal conviction of either spouse in which the other spouse or child was the victim (A.R.S. § 25-319(B) (13)).** No such damages or judgments exist.

Having considered the evidence and all relevant factors,

IT IS ORDERED that Father shall pay to Mother \$1,000 per month for Spousal Maintenance for a period of 48 months, payable through the Support Payment Clearinghouse on the 1st day of each month, commencing July 1, 2012, by Income Withholding Order.

LET THE RECORD REFLECT an Income Withholding Order is initiated electronically by the above-named deputy clerk. Confirmation # 374642

VI. Property and Debt

THE COURT FINDS from review of the parties' Pretrial Statements that they agree regarding repayment of debts. Pursuant to that agreement,

IT IS ORDERED that:

1. Each party shall pay, and indemnify and hold the other party harmless from, half of any joint debts (none are believed to exist).
2. Each party shall pay, and indemnify and hold the other harmless from, any debt in his/her name, whether presently known or unknown.

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The parties' marital residence is located at 4344 North 111th Lane, Phoenix, Arizona.

THE COURT FINDS that the property is worth approximately \$70,700 (Exhibit 11) and is subject to both a mortgage of \$59,775 (Exhibit 9) and a line of credit with a balance of \$21,028 (Exhibit 10). Therefore the property is approximately \$10,000 under water, and Wife concedes that she does not have the ability to refinance the debt.

IT IS THEREFORE ORDERED that the parties shall agree on a real estate agent to list the property located at 4344 North 111th Lane, Phoenix, Arizona, for sale. Any equity or deficiency shall be split equally.

IT IS FURTHER ORDERED that Wife may remain in the marital residence pending sale, provided that she continues timely to make all mortgage and line of credit payments.

The parties divided their personal property some time ago. Husband contends that Wife received more valuable property than he did. Husband's Pretrial Statement, at 2. But Husband presented no evidence in support of that theory.

IT IS THEREFORE ORDERED awarding to Husband as his sole and separate property, subject to any liens or encumbrances thereon, all vehicles, household furniture, furnishings and appliances, and other personal property currently in his possession.

IT IS FURTHER ORDERED awarding to Wife as her sole and separate property, subject to any liens or encumbrances thereon, all vehicles, household furniture, furnishings and appliances, and other personal property currently in her possession.

Mother also is driving the 2008 Honda Accord and has agreed to be responsible for the \$7,000 debt (Exhibit 8) on it.

IT IS THEREFORE ORDERED awarding to Wife as her sole and separate property, subject to any liens or encumbrances thereon, the 2008 Honda Accord. Wife shall pay, and indemnify and hold Husband harmless from, the debt associated with this automobile.

VII. Attorney's Fees

Both sides seek an award of attorney's fees. Pursuant to A.R.S. § 25-324,

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THE COURT FINDS that both parties have been unreasonable to some extent, and Husband has greater financial resources.

In the exercise of the Court's discretion,

IT IS ORDERED that Husband shall pay Wife on or before September 1, 2012 the sum of \$2,000 as a contribution to her attorney's fees and costs.

IT IS FURTHER ORDERED signing this minute entry as a formal order of this Court pursuant to Rule 81, Arizona Rules of Family Law Procedure.

/ s / HON. M. SCOTT McCOY

HON. M. SCOTT McCOY
JUDGE OF THE SUPERIOR COURT

FILED: Exhibit Worksheet